No. 90-575

In The

# Supreme Court of the United States

October Term, 1990

TIGER INN,

*Petitioner,*

vs.

SALLY FRANK,

*Respondent.*

**Petition For A Writ Of Certiorari To The Supreme Court Of New Jersey**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI ON BEHALF OF RESPONDENT NEW JERSEY DIVISION ON CIVIL RIGHTS

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## QUESTION PRESENTED

Does the First Amendment to the United States Constitution preclude the State of New Jersey from enforcing its anti-discrimination statute against an eating club which has been found, based on a voluminous record of evidence, to be a place of public accommodation which is integrally connected to Princeton University?

## LIST OF PARTIES

Petitioner Tiger Inn omitted the New Jersey Division on Civil Rights ("Division") from the List of Parties set forth in its Petition for a Writ of *Certiorari*. The Division participated as a party respondent in the proceedings before the Supreme Court of New Jersey as well as in the Superior Court of New Jersey, Appellate Division, and is therefore properly a party to the instant matter under Supreme Court Rule 19.6.

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## COUNTERSTATEMENT OF THE CASE

This matter began in December 1979, when respondent Sally Frank filed a verified complaint with the Division against, among other parties, Tiger Inn ("Tiger"), the Ivy Club, and the University Cottage Club ("Clubs"), alleging discrimination based on sex in a place of public accommodation in violation of the New Jersey Law Against Discrimination ("LAD"), *N.J.S.A.* 10:5-12(f). After a brief investigation, the Division determined that it

lacked jurisdiction over the Clubs and was therefore unable to adjudicate this matter. Ms. Frank successfully appealed this decision to the Appellate Division of the Superior Court of New Jersey, which remanded the case to the Division for further investigation and fact-finding. *Frank v. Ivy Club*, 120 *N.J.* 73, 80, 576 *A.*2d 241, 244 (1990) (Pal to Pa36).*

On remand, the Division proceeded to conduct an extensive investigation in which the parties presented and cross-examined witnesses, submitted documents and reached agreement on over 200 stipulations. *Id.*, 120 *N.J.* at 81-82, 576 *A.*2d at 245. Along with these factual submissions, Tiger (and the other Clubs), extensively briefed the issue of whether the Clubs were protected from the reach of the LAD because of First Amendment associational rights.

On May 14, 1985, the Division issued a finding of probable cause which included a finding of jurisdiction (Pa180). In concluding that the Division had jurisdiction over the Clubs, the Division addressed at length the freedom of association claims raised by the Clubs in light of this Court's decision in *Roberts v. United States Jaycees*, 468 *U.S.* 609 (1984), holding that the Clubs' " . . . free association rights would not be violated by the assertion of jurisdiction over these 'private clubs' that are integrally connected with Princeton University" (Pa218).

After an adversarial administrative hearing on remedies, on May 26, 1987, the Division issued its final

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*"Pa" refers to the Appendix to the Petition for a Writ of *Certiorari* filed by Tiger Inn.

order in this matter, which directed Tiger and the other Clubs to admit women (reversing a recommendation by an administrative law judge that allowed the Clubs to sever ties with Princeton in lieu of complying with the LAD); awarded damages and attorney's fees to Ms. Frank; and reaffirmed the earlier Division ruling on the Clubs' associational rights claim (Pa68).

Tiger appealed this decision to the Appellate Division of the Superior Court of New Jersey, which remanded the case for additional proceedings because certain facts allegedly remained in dispute. *Frank v. Ivy Club*, 228 *N.J. Super.* 40, 548 *A.*2d 1142 (N.J. App. Div. 1988) (Pa38).

After granting certification, on July 3, 1990, the Supreme Court of New Jersey issued its decision, which reversed the Appellate Division and reinstated the May 26, 1987 Division order. *Frank v. Ivy Club, supra*, 120 *N.J.* at 111, 576 *A.*2d at 261. While not discussing the First Amendment issue at length, the Court noted that the Division "rejected the argument that the Club members' constitutional free-associational rights would be violated" if the Clubs were subject to the LAD. *Id.*, 120 *N.J.* at 92, 576 *A.*2d 251. Moreover, the Clubs' claim that they are "distinctly private" and thus exempt from the anti-discrimination law – an issue inextricably intertwined with the constitutional privacy claim – was extensively discussed and rejected by the New Jersey Supreme Court. 120 *N.J.* at 102-104, 110-112, 576 *A.*2d at 256-257, 260-261.

The factual history of this matter is fully described in the decision of the Supreme Court of New Jersey, *Frank v. Ivy Club, supra*. A brief synopsis of relevant facts set forth

below underscores why, as found by the Division and the State Supreme Court, Tiger is not the type of highly personal and intimate association protected from the reach of state anti-discrimination laws by the First Amendment.

After extensive agency proceedings, which produced a record consisting of over 5,000 pages of evidence,* the following material facts were undisputed (*see, Id.*, 120 *N.J.* at 83-90, 576 *A.*2d at 246-250):

1. The Clubs, including Tiger, provide dining facilities for a majority of upperclass students of Princeton University ("Princeton"). The University in fact has space in its dining halls to accommodate only a small percentage of its upperclass students.

2. The Clubs, including Tiger, advertise "bicker" (the membership selection process), open-house events and parties in the *Daily Princetonian*, the campus newspaper. Non-members of Tiger, including women, attend such parties and open houses.

3. The Clubs, including Tiger, are rented out occasionally for non-Club functions attended by non-members, including women.

4. Princeton informs upperclass students about dining options, including the Clubs, through various University publications.

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*In its Appendix, Tiger Inn has placed before the Court only the decisions below. In the event this Court grants the Writ of *Certiorari*, Tiger should be required to file with the Court the entire appendix which was submitted to the Supreme Court of New Jersey, which contains all of the evidence presented to the Division on Civil Rights.

5. Tiger participates in Princeton's general meal exchange program whereby non-member student guests of Tiger members, including women, are allowed to eat at Tiger at no additional cost if the non-member students are part of the University's dining system. Tiger also participates in the Upperclass Choice Meal Exchange, whereby non-member sophomores who are not guests can dine at Tiger, with cost of the meal reimbursed by Princeton.

6. A 1967 report of Princeton's Subcommittee of the Faculty Committee on Undergraduate Life concluded that "the University and the Clubs are now mutually dependent on each other. The Clubs depend on the University for an annual supply of undergraduates that virtually insures the continuance of the system; and the University depends on the Clubs for dining and recreational facilities."

7. Acting on the results of a study seeking improved integration of the Clubs and Princeton, beginning in 1975, Princeton began to help in the collection of overdue Club accounts; adopted a resolution "reaffirming the University's view that the Club system provides an important social option for undergraduates;" arranged for presentation of the Clubs in freshman orientation; and described the Club system in a student handbook.

8. Princeton University provides financial aid to its students to cover the cost of belonging to an eating club. [Pa193]

9. At the time that Tiger Inn rejected Sally Frank for membership because of her gender, the selective clubs such as Tiger participated in a system known as the "hat bid." Under this system, a male applicant for a

> selective club such as Tiger who was not otherwise offered club membership through the Bicker process, was given the opportunity to join a selective club through a random assignment process. [Pa185]

Based on such facts the Division concluded that Princeton relies on the Club system to feed a majority of upperclass students; that the Club system is associated with Princeton and is characterized by all parties as serving Princeton students; and that non-member students participate in many Club activities and utilize Club facilities. *Id.*, 120 *N.J.* at 91-92, 576 *A.*2d at 250-251 (Pa14 to Pa15).

In its decision, the Supreme Court of New Jersey specifically affirmed both these underlying facts and the ultimate conclusion reached by the Division concerning the existence of "an integral and symbiotic relationship" between the Clubs, including Tiger, and Princeton. *Id.*, 120 *N.J.* at 104, 576 *A.*2d at 257. The Court placed particular emphasis on the facts that the discriminatory eating clubs (including Tiger Inn) are held out as part of a club system which serves Princeton students; that the Clubs draw their membership almost exclusively from Princeton University students; and that Princeton relies on the club system to feed a majority of its upperclass students. 120 *N.J.* at 103, 576 *A.*2d at 256. Based on the undisputed facts, the Court found the University and the Clubs to be functionally interdependent and to have "an integral relationship of mutual benefit." 120 *N.J.* at 110, 576 *A.*2d at 260. The Court also held that while the parties did not agree on a variety of proposed stipulations, there were no material facts in dispute. *Id.*, 120 *N.J.* at 105-110, 576 *A.*2d at 257-260.

The Court concluded that:

> Where a place of public accommodation and an organization that deems itself private share a symbiotic relationship, particularly where the allegedly 'private' entity supplies an essential service which is not provided by the public accommodation, the servicing entity loses its private character and becomes subject to laws against discrimination [citations omitted]. It would be disingenuous for the Clubs to assert that they could ever exist apart from Princeton University. The Clubs gather their membership from Princeton and, in turn, provide the service of feeding Princeton students. Because of this, the Clubs lack the distinctly private nature that would exempt them from LAD. [120 *N.J.* at 104, 576 *A.*2d at 257]

Reaffirming the State's compelling interest in eradicating gender discrimination and the particularly critical importance of eliminating discrimination in educational institutions, the Court affirmed the Division's ruling that Tiger Inn must cease discriminating against women students. 120 *N.J.* at 110-111, 576 *A.*2d at 260.

## SUMMARY OF ARGUMENT

The writ should be denied because the decision below was entirely consistent with the decisions of this Court concerning the power of states to apply their anti-discrimination laws to organizations claiming to be private clubs. *Roberts v. United States Jaycees*, 468 *U.S.* 609 (1984); *Bd. of Directors of Rotary Int'l v. Rotary Club*, 481 *U.S.* 537 (1987); *New York State Club Ass'n v. City of New York*, 487 *U.S.* 1 (1988). Tiger Inn was found by the

Supreme Court of New Jersey to be a place of public accommodation because of its integral connection to Princeton University. This Court should defer to the factual findings of the Division and the Supreme Court of New Jersey concerning the interrelationship between the Clubs and Princeton, and should not permit Tiger Inn to relitigate those facts here. *Time, Inc. v. Firestone*, 424 *U.S.* 448, 463 (1976). Moreover, apart from its relationship to Princeton, Tiger Inn does not meet the standard for a private club, as articulated in *Roberts, Rotary* and *New York Club Ass'n*, primarily because it is not a small, intimate or family-like group, having over 1700 members and because non-members including women regularly participate in the core activities of the club. As a place of public accommodation, Tiger Inn has no First Amendment right to invidiously discriminate against women. *See, Bell v. Maryland*, 378 *U.S.* 226 (1964).

## ARGUMENT

### THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE SUPREME COURT OF NEW JERSEY IS FULLY CONSISTENT WITH THE DECISIONS OF THIS COURT CONCERNING THE APPLICATION OF STATE ANTI-DISCRIMINATION LAWS TO ALLEGEDLY PRIVATE CLUBS.

Since 1984, this Court has issued three decisions involving the interplay between state anti-discrimination laws and First Amendment associational rights, *Roberts v. United States Jaycees*, 468 *U.S.* 609 (1984), *Board of Directors of Rotary International v. Rotary Club*, 481 *U.S.* 537 (1987) and *New York State Club Association v. New York City*, 487

*U.S.* 1 (1988). In these three cases, this Court has recognized a First Amendment right to freedom of intimate association which shields from State intrusion certain family-type relationships. *Roberts v. United States Jaycees, supra,* 481 *U.S.* at 619-620; *Board of Directors of Rotary International v. Rotary Club, supra,* 481 *U.S.* at 545. However, such First Amendment protections are not absolute, and must be balanced with "the compelling state interest" in the eradication of discrimination against women. *Roberts, supra,* 468 *U.S.* at 620; *Rotary Club, supra,* 481 *U.S.* at 549. Because factors including size, membership practices and the lack of seclusion from others in central activities demonstrated that the clubs involved in these cases were not highly intimate associations, this Court upheld the application of State anti-discrimination laws against the clubs in all three decisions.

The instant case involves a logical application of the principles set forth in *Roberts, Rotary Club* and *New York State Club Association* to a club which provides crucial services for a large university subject to the LAD, and which does not possess the distinctive characteristics that would bring it within the constitutional protection afforded a highly personal or intimate association. Given the New Jersey Supreme Court's correct decision, based on the unique facts of this case, and this Court's recent explication of the constitutional considerations in applying state anti-discrimination laws to club membership policies, there is simply no warrant to grant *certiorari.**

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* Tiger is wrong in asserting that the decision of the Supreme Court of New Jersey will have "a far-reaching

(Continued on following page)

In *Roberts* and *Rotary Club*, this Court held that "a careful assessment" must be made of an association's "objective characteristics" to determine whether the association involves such close and intimate familial-type relationships as to warrant constitutional protection. *Rotary Club, supra*, 481 *U.S.* at 545-546; *Roberts v. United States Jaycees, supra*, 468 *U.S.* at 620. The central "objective characteristic" of Tiger, as found by the Division and the New Jersey Supreme Court, is its "symbiotic relationship" with, and dependence on Princeton, an institution which has already been determined by the New Jersey Supreme Court to be a public accommodation subject to the LAD. *Peper v. Princeton University Board of Trustees*, 77

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impact," potentially affecting thousands of fraternity and sorority chapters (Tiger Petition for Writ of *Certiorari*, p. 14). New Jersey's anti-discrimination law (as well as those of many other states) does not apply to an "accommodation which is in its nature reasonably restricted exclusively to members of one sex" (for example, a "camp, bathhouse, dressing room, . . . comfort station") or to real property which is planned for and occupied exclusively by persons of one sex. *N.J.S.A.* 10:5-12(f); *N.J.S.A.* 10:5-12(g). While an eating club such as Tiger is not "by its nature" a single-sex institution, and while its members do not live in the club house, these statutory exemptions could at least arguably be relied upon by fraternities. Moreover, a college fraternity or sorority in which members live together far more closely resembles a constitutionally protected familial association than does an eating club such as Tiger, whose central functions involve the provision of dining and social services. Indeed, despite the claim of Tiger and of *amicus* National Inter-Fraternity Conference that the 1987 decision of the Division, as affirmed by the New Jersey Supreme Court, opens the door to challenges to single-sex fraternities, neither Tiger nor *amicus* cite a single such case.

*N.J.* 55, 67, 389 *A.*2d 465 (N.J. 1978). As detailed in the decision below, Tiger depends on Princeton for providing the Club with continued membership, and Princeton depends on Tiger (and the other Clubs) for feeding students and providing them with social activities. This Court should defer to the factual findings below concerning the functional interdependence between Princeton and the eating clubs and should not permit Tiger to relitigate those factual issues here. *Time, Inc. v. Firestone,* 424 *U.S.* 448, 463 (1976). Because of Tiger's close connection with a large University unquestionably subject to the LAD – a relationship in which Tiger is involved in important functions of University life – Tiger cannot claim that it is the kind of highly intimate or private association shielded by the First Amendment. *See, Burton v. Wilmington Parking Authority,* 365 *U.S.* 715 (1961) (inter-connection between restaurant and governmental parking authority triggered application of Equal Protection Clause in race discrimination case). *See also, Adams v. Miami Police Benevolent Assoc.,* 454 *F.*2d 1315 (5th Cir. 1972), *cert.* den. 409 *U.S.* 843 (1972); *Franklin v. United Commercial Travelers,* 590 *F. Supp.* 255, 259-260 (D. Mass. 1984) (fraternal benefit society not distinctly private and exempt from state anti-discrimination law because of its close connection with municipal police department); *United States Power Squadrons v. State Human Rights Appeal Board,* 452 *N.E.*2d 1199, 1205, 465 *N.Y.S.*2d 871, 877 (N.Y.Ct. of App. 1983) (ongoing relationship of boating club to governmental entities for purpose of informing public about boating safety negated claim by club that it was entitled to First Amendment immunity from state anti-discrimination law).

Moreover, regardless of Tiger's interrelationship with Princeton, the undisputed facts in this matter demonstrate that Tiger is not the type of association warranting First Amendment protection from anti-discrimination laws. Among the attributes that distinguish relationships protected by the First Amendment are "relative smallness, a high degree of selectivity to begin and maintain the affiliation, and seclusion from others in crucial aspects of the relationship." *Roberts*, 468 *U.S.* at 620. *See also, Rotary Club, supra*, 481 *U.S.* at 546. Tiger meets none of these prerequisites.

First, Tiger is not a "relatively small" association, as it has over 1,700 members, including 125 undergraduate members (Tiger Petition, p. 14). Tiger is thus larger than entities which this Court found were not sufficiently intimate associations to warrant First Amendment protection. In *Roberts*, the two Jaycees chapters had 400 and 430 members, respectively. *Id.*, 468 *U.S.* at 621. In *Rotary Club*, the unprotected local clubs ranged in membership from fewer than 20 to more than 900. 481 *U.S.* 456. Further, in *New York State Club Association*, this Court found that the local law barring discrimination in clubs with more than 400 members (which provided regular meal service and received payment from non-members) could be constitutionally applied. 487 *U.S.* at 6, 12.

Second, Tiger's membership practices are not so selective as to warrant a finding of intimate associational rights. Although the practice has been discontinued, at the time of Tiger's rejection of Ms. Frank, male applicants for a selective club such as Tiger who were not otherwise admitted were given the opportunity to join a selective

club through a random assignment process known as a "hat bid" (Pa185).

Finally, Tiger's members are not secluded from others to a sufficient degree to warrant First Amendment protection. In *Rotary Club*, this Court held that the participation of non-members in "central" activities of an association strongly weighs against a finding that the association involves the type of intimate or highly personalized relationships shielded from state interference. *Rotary Club, supra*, 481 *U.S.* at 547. Moreover, in *New York State Club Association*, the fact that the challenged law was designed to cover clubs which provided regular meal service to, and received payments from, non-members was a primary basis for this Court's rejection of the First Amendment overbreadth claim, as these criteria at least facially demonstrated "the non-private nature" of associations subject to the law. *New York State Club Association, supra*, 487 *U.S.* at 12.

In this case, among Tiger's primary functions are the provision of meals and social activities. Tiger participates in meal exchange programs whereby non-member guests, and certain sophomore students, who are not guests, dine at Tiger. *Frank v. Ivy Club, supra*, 120 *N.J.* at 87-88, 576 *A.*2d at 248. Tiger actively solicits participation by non-members in open-house events and parties, and rents the Club for private functions attended by non-members. *Id.*, 120 *N.J.* at 86, 576 *A.*2d at 247. Significantly, Tiger allows (and indeed encourages) the participation of women in Tiger's central social functions, parties and open-houses. It is also undisputed that Tiger members routinely dine with female guests at the Club (R at 1717a to 1719a;

1480a; 2813a; 2819a; 3019a to 3021a; 3030a).* These undisputed facts demonstrate the lack of "seclusion from others" in core activities of Tiger's members. Moreover, it is clear that seclusion from women is simply not a central characteristic of this association and that the members' First Amendment rights would not be violated if the club is required to cease discriminating against women in its membership policies.

As Tiger is not the type of intimate family-type association constitutionally shielded from the reach of the LAD, the State properly applied its LAD to preclude Tiger from discriminating against women.

Moreover, even assuming for the sake of argument that Tiger could meet the *Roberts* standard for a private club, its interest in excluding women must be weighed against the compelling State interest in the eradication of discrimination. As held by the court below:

> Gender discrimination is contrary to the legislative policy of the State of New Jersey. "The eradication of the 'cancer of discrimination' has long been one of our State's highest priorities". . . . The Legislature enacted LAD to reflect the belief that "discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions of a free democratic state." *N.J.S.A.* 10:5-3. The elimination of discrimination in educational institutions is particularly critical. [*Frank v. Ivy Club, supra,* 120 *N.J.* at 110, 576 *A.*2d at 260, quoting *Dixon v. Rutgers,* 110 *N.J.* 432, 451, 541 *A.*2d 1046 (1988)]

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* "R" refers to the record below.

This Court has squarely recognized this "compelling" state interest "in eradicating discrimination against its female citizens," an interest this Court found significant enough to outweigh the right to expressive association* of the defendant clubs in *Roberts, supra,* 468 *U.S.* at 623, and *Rotary Club, supra,* 481 *U.S.* at 549. Discrimination by Tiger Inn will cause harm to female students at Princeton who, like Ms. Frank in 1979, will suffer the pain and humiliation of being excluded, solely because of their sex, from a Club which provides central functions for the University. Indeed, the harm to female students extends beyond the stigma of being prohibited from utilizing one of the University's primary dining and social facilities. Affiliation in clubs such as Tiger provides links to both graduate and undergraduate members which can enhance a member's career opportunities. The First Amendment cannot be used by a place of public accommodation as a shield for its discriminatory policies. *Roberts, supra,* 468 *U.S.* at 628; *Bell v. Maryland,* 378 *U.S.* 226 (1964). Given Tiger's integral relationship with Princeton University, it is clear that the State's interest in requiring Tiger to comply with the Law Against Discrimination outweighs Tiger's interest in continuing to invidiously exclude women students from membership.

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* The First Amendment right to expressive association has not been raised by Tiger in this case, as Tiger does not exist for expressive associational purposes.

## CONCLUSION

For the foregoing reasons, respondent New Jersey Division on Civil Rights respectfully requests that the Petition for a Writ of *Certiorari* be denied.

Respectfully submitted,

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DATED: DECEMBER 28, 1990